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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF OREGON  
6 PORTLAND DIVISION  
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8 JADENE STENSLAND, )  
9 Plaintiff, ) No. 03:11-cv-00490-HU  
10 vs. )  
11 CITY OF WILSONVILLE, a municipality )  
12 incorporated in the State of Oregon; )  
13 MICHAEL BOWERS, an individual; and )  
14 MICHAEL STONE, an individual; )  
15 Defendants. )

MEMORANDUM OPINION AND ORDER  
ON MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
AND MOTION TO DISMISS

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17  
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HUBEL, Magistrate Judge:

### **INTRODUCTION**

The plaintiff Jadene Stensland brings this employment action against her former employer, City of Wilsonville (the "City"); her former direct supervisor, Michael Stone; and Stone's direct supervisor, Michael Bowers. The case is before the court on the defendants' motion seeking partial summary judgment as to certain of Stensland's claims, and dismissal of certain of her claims. Dkt. #10.

### **BACKGROUND FACTS**

On March 14, 2006, the City extended an offer of employment to Stensland by way of a letter. Among other things, the letter specified that "[t]he Deputy City Engineer - Capital Projects position[] is an at will position which serves at the pleasure of the City Manager. All city management employees have signed a statement that they understand this status." Dkt. #13, Decl. of Andrea M. Villagrana (the City's Human Resources Manager), Ex. 1, p.1. On March 17, 2006, Stensland accepted the employment offer by signing the bottom of the letter evidencing her agreement with the terms and conditions of employment outlined in the letter. *Id.*, p. 2.

Enclosed with the letter offer was the City's "Manager Staff Directive #41," which stated as follows:

#### **Management/Confidential At-Will Status**

The City Manager has the final authority in the appointment, removal, and supervision of all management/confidential employees, with

1 the exception of those appointed directly by  
2 the City Council (City Attorney, Judge).

3 Management/Confidential employees are employed  
4 at-will and the City and its employees  
5 mutually reserve the right to end the  
6 employment relationship, with or without  
7 cause, at any time.

8 . . . In lieu of individual contracts,  
9 management/confidential employees shall sign  
10 this staff directive indicating receipt and  
11 understanding of the terms of employment with  
12 the City of Wilsonville.

13 *Id.*, Ex. 2; Dkt. #20-2, Amended Decl. of Plaintiff, Directive #41  
14 (ECF p. 34 of 46). Stensland signed a legend at the bottom of  
15 Directive #41, indicating, "I, Jadene Stensland[,] have received  
16 and read a copy of this City Manager Directive regarding my at-will  
17 status as an employee of the City of Wilsonville." *Id.*

18 The City does not have an employee handbook, but does have a  
19 set of City Manager Staff Directives (collectively, the "Staff  
20 Directives") setting forth key policies and procedures of the City.  
21 Dkt. #14, Decl. of Michael Kohlhoff (City Attorney), ¶ 3; Dkt. #20,  
22 ¶ 22 & Ex. C. A copy of the Staff Directives was provided to  
23 Stensland during the course of her employment with the City. Dkt.  
24 #20, ¶ 22. The Staff Directives include, among other things,  
25 Directive #41, quoted above; Directive #11, describing the City's  
26 Administrative Leave policy; Directive #18, explaining the timing  
27 of performance evaluations, and their distribution by the Human  
28 Resources Assistant; and Directive #27, the City's anti-harassment  
and anti-discrimination policies and procedures. See Dkt. ##20-1  
& 20-2.

Stensland began working for the City on April 24, 2006. She  
alleges that beginning at some point in 2008, and continuing until

1 her termination in the spring of 2010, she was subjected to ongoing  
2 gender-based discrimination and sexual harassment by Gerald Fisher,  
3 an employee under her direct supervision, and whom she claims is "a  
4 close personal friend" of Stone's. Dkt. #1, ¶ 9. Specifically,  
5 she alleges the following:

- 6 a) Fisher "engage[d] in insubordinate behavior directed at  
7 [Stensland's] gender" including, without limitation,  
8 "openly expressing his unwillingness to be supervised by  
9 a woman." Dkt. #1, ¶ 9; Dkt. #20, ¶ 11.
- 10 b) In September 2008, Stensland completed an annual review  
11 of Fisher "which included comments relating to needed  
12 improvement of his communication and social skills."  
13 Dkt. #20, ¶ 6. Stone directed her to revise the report  
14 to indicate Fisher was exceeding expectations in all  
15 categories. *Id.*
- 16 c) Stensland "received in her departmental inbox a 1950's  
17 magazine article, which stated boldly, 'Women should know  
18 their place[.]'" *Id.*, ¶ 12; see Dkt. #20, Ex. B (article  
19 entitled "The good wife's guide," stating, *inter alia*, "A  
20 good wife always knows her place."). Stensland believed  
21 the article "was a matter of harassment and discrimina-  
22 tion based on [her] status as a woman[.]" Dkt. #20,  
23 ¶ 13. Stone failed to address her complaint regarding  
24 the article. *Id.*
- 25 d) Stone told Stensland and the company's Human Resources  
26 Manager that Fisher did not want to work for a woman, and  
27 it would be better if Fisher reported directly to Stone.  
28 Dkt. #1, ¶ 15; Dkt. #20, ¶¶ 10 & 11.

- 1 e) Stensland recommended, in the summer of 2009, that Fisher  
2 be terminated "based on his continued insubordinate and  
3 inappropriate behavior, which was primarily directed at  
4 [Stensland's] gender." Stone verbally reprimanded her  
5 for this recommendation, explaining that managers could  
6 only be terminated in accordance with certain disci-  
7 plinary procedures set forth in the City's "Staff  
8 Directives" manual. Stone allowed Stensland to give  
9 Fisher a verbal warning. Dkt. #1, ¶¶ 16-17.
- 10 f) Stensland conducted a standard performance evaluation of  
11 Fisher on or about September 4, 2009, which included a  
12 recitation of Fisher's insubordinate behavior. On or  
13 about September 11, 2009, Stone ordered Stensland to  
14 amend the evaluation "to remove all references to any  
15 insubordinate behavior." *Id.*, ¶¶ 18-19. Stensland was  
16 threatened with termination if she refused to make the  
17 changes. Dkt. #20, ¶ 14.
- 18 g) Stensland was "reassured" by Stone that "discipline for  
19 Managers follows the union process," and she would not be  
20 terminated until she had "received a verbal warning,  
21 followed by a written warning and provided with a work-  
22 plan to help [her] succeed." *Id.*, ¶ 15.
- 23 h) In the fall of 2009, Fisher told his co-workers that he  
24 and Stone "had conceived a plan to push [Stensland] 'out  
25 of the picture[.]'" Fisher "showed co-workers a new  
26 organizational chart which included Fisher in  
27 [Stensland's] position, and did not include [Stensland]  
28

1 at all." Stensland reported the matter to Stone, but no  
2 action was taken. Dkt. #1, ¶¶ 20-22.

3 i) Following Fisher's comments to his co-workers, a rumor  
4 began circulating about Stensland being forced out, and  
5 sometime thereafter, her "project assignments decreased  
6 from an average of six active assignments to one." *Id.*,  
7 ¶ 24. In February 2010, her supervisory authority over  
8 Fisher was revoked, and her duties were decreased,  
9 "accommodating Fisher's unwillingness to work for a woman  
10 by having Fisher report directly to Stone." *Id.*, ¶ 26.

11 j) Stensland also reported the ongoing hostile work  
12 environment to Bowers during the winter of 2009-2010 and  
13 spring of 2010. To her knowledge, no investigation ever  
14 took place in response to her complaints. *Id.*, ¶¶ 27-28.

15 Stensland alleges that prior to her complaints about Fisher's  
16 discriminatory and harassing behavior, and the resulting hostile  
17 work environment, her performance evaluations always were  
18 satisfactory in all respects. She claims that in April 2010,  
19 Bowers approached her to discuss her work assignments, and during  
20 their meeting, Bowers "assured" her that a management-level  
21 employee could not be fired for performance-related issues "without  
22 first being counseled and given the opportunity to improve in those  
23 areas." *Id.*, ¶¶ 31-32. However, despite her "requests for  
24 assistance from the management team over the course of eighteen  
25 months," Stensland never was offered any coaching or mentoring.  
26 Dkt. #20, ¶ 21. She was terminated on May 21, 2010. According to  
27 Stensland, her termination was "based on alleged performance  
28 related issues." *Id.*, ¶ 33.

1 Stensland filed the instant case on April 21, 2011, asserting  
 2 claims under 42 U.S.C. § 1983 and ORS § 659A.030, for sexual  
 3 harassment, hostile work environment, wrongful discharge,  
 4 retaliation, breach of contract, and violation of her constitu-  
 5 tional rights. Stensland claims the defendants' actions caused her  
 6 to suffer "pain, fear, grief, anxiety, worry, and embarrassment,"  
 7 *id.*, ¶ 42, and she seeks economic, noneconomic, and punitive  
 8 damages, *id.*, p. 18. She has alleged ten causes of action:

- 9 • First Claim for Relief: Fourteenth Amendment  
 10 Violation; 42 USC § 1983 (Against Stone, and  
 11 Bowers, and City of Wilsonville) [gender-based  
 12 discrimination, sexual harassment, hostile work  
 13 environment, and retaliatory discharge]
- 14 • Second Claim for Relief: Fourteenth Amendment  
 15 Violation; 42 USC § 1983 (Against City of  
 16 Wilsonville) [equal protection violation as a  
 17 result of City's alleged endorsement and approval  
 18 of Stone's, Bowers's, and Fisher's actions]
- 19 • Third Claim for Relief: Constitutional Rights  
 20 Violations by City of Wilsonville Due to Failure to  
 21 Adequately Train and Supervise
- 22 • Fourth Claim for Relief: Negligent Retention and  
 23 Supervision (Against City of Wilsonville)
- 24 • Fifth Claim for Relief: Sexual Harassment (Against  
 City of Wilsonville). Count One: Discrimination.  
 Count Two: Hostile Work Environment. Count Three:  
 Retaliation.
- Sixth Claim for Relief: Wrongful Discharge (Against  
 City of Wilsonville)
- Seventh Claim for Relief: Breach of Employment  
 Contract (Against City of Wilsonville)
- Eighth Claim for Relief: Breach of Implied Contract  
 (Against City of Wilsonville)
- Ninth Claim for Relief: Breach of Oral Contract  
 (Against City of Wilsonville)
- Tenth Claim for Relief: Breach of Duty of Good  
 Faith and Fair Dealing (Against City of Wilson-  
 ville)

24 Dkt. #1.

25 On October 30, 2009, Stensland filed a petition for relief  
 26 under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.*  
 27 See Dkt. #12, Decl. of Brian K. Weeks, Ex. 1 (copy of Stensland's  
 28 Voluntary Petition in Bankruptcy Case No. 09-39088-elp7). She

1 filed her bankruptcy schedules on November 19, 2009. *Id.*, Ex. 2.  
2 Stensland did not list as an asset in her bankruptcy schedules any  
3 claims, including any potential or contingent claims. *Id.*  
4 Stensland received a "No Asset" discharge on February 16, 2010.  
5 *Id.*, Ex. 3 (docket sheet in Case No. 09-39088-elp7 (Bankr. D. Or.);  
6 see Dkt. #21, noting entry of order of discharge). She has not  
7 moved to amend her bankruptcy schedules at any time since her  
8 discharge. See *id.*

9 The defendants move for partial summary judgment or dismissal  
10 as to all of Stensland's claims for relief, except her sexual  
11 harassment claim against the City for alleged actions that occurred  
12 after February 16, 2010. The court will review the standards for  
13 summary judgment and for motions to dismiss, and then consider each  
14 of the defendants' motions.

#### 15 16 **SUMMARY JUDGMENT STANDARDS**

17 Summary judgment should be granted "if the movant shows that  
18 there is no genuine dispute as to any material fact and the movant  
19 is entitled to judgment as a matter of law." Fed. R. Civ. P.  
20 56(c)(2). In considering a motion for summary judgment, the court  
21 "must not weigh the evidence or determine the truth of the matter  
22 but only determine whether there is a genuine issue for trial."  
23 *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002)  
24 (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th  
25 Cir. 1996)).

26 The Ninth Circuit Court of Appeals has described "the shifting  
27 burden of proof governing motions for summary judgment" as follows:  
28

1 The moving party initially bears the burden of  
2 proving the absence of a genuine issue of  
3 material fact. *Celotex Corp. v. Catrett*, 477  
4 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d  
5 265 (1986). Where the non-moving party bears  
6 the burden of proof at trial, the moving party  
7 need only prove that there is an absence of  
8 evidence to support the non-moving party's  
9 case. *Id.* at 325, 106 S. Ct. 2548. Where the  
10 moving party meets that burden, the burden  
11 then shifts to the non-moving party to design-  
12 ate specific facts demonstrating the exist-  
13 ence of genuine issues for trial. *Id.* at  
14 324, 106 S. Ct. 2548. This burden is not a  
15 light one. The non-moving party must show  
16 more than the mere existence of a scintilla of  
17 evidence. *Anderson v. Liberty Lobby, Inc.*,  
477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed.  
2d 202 (1986). The non-moving party must do  
more than show there is some "metaphysical  
doubt" as to the material facts at issue.  
*Matsushita Elec. Indus. Co., Ltd. v. Zenith  
Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.  
1348, 89 L. Ed. 2d 528 (1986). In fact, the  
non-moving party must come forth with evidence  
from which a jury could reasonably render a  
verdict in the non-moving party's favor.  
*Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In  
determining whether a jury could reasonably  
render a verdict in the non-moving party's  
favor, all justifiable inferences are to be  
drawn in its favor. *Id.* at 255, 106 S. Ct.  
2505.

18 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th  
19 Cir. 2010). Notably, "[a]s a general matter, the plaintiff in an  
20 employment discrimination action need produce very little evidence  
21 in order to overcome an employer's motion for summary judgment."  
22 *Chuang v. Univ. of Calif. Davis, Bd. of Trustees*, 225 F.3d 1115,  
23 1124 (9th Cir. 2000). The *Chuang* court explained that this minimal  
24 evidence standard is due to the nature of employment cases, where  
25 "'the ultimate question is one that can only be resolved through a  
26 searching inquiry - one that is most appropriately conducted by a  
27 factfinder, upon a full record.'" *Id.* (quoting *Schnidrig v.  
28 Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

**STANDARDS FOR MOTIONS TO DISMISS**

Chief Judge Aiken of this court recently set forth the standard for the court's consideration of a motion to dismiss in *Gambee v. Cornelius*, No. 10-CV-6265-AA, 2011 WL 1311782 (D. Or. Apr. 1, 2011) (Aiken, C.J.). Judge Aiken observed:

Under Fed. R. Civ. P. 12(b)(6), a complaint is construed in favor of the plaintiff, and its factual allegations are taken as true. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563[, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929] (2007). "[G]enerally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint." *Daniels-Hall*, 629 F.3d at 998.

*Id.* at \*2.

**DISCUSSION**

**A. Judicial Estoppel**

The defendants seek summary judgment on all of Stensland's claims that arose on or before February 16, 2010 – the date of her bankruptcy discharge – on the basis that those claims are precluded under the doctrine of judicial estoppel because Stensland failed to list those claims on her bankruptcy schedules, and she also failed

1 to move to amend her bankruptcy schedules after her employment with  
2 the City was terminated. The defendants argue Stensland "obviously  
3 knew of the alleged facts relating to her claims" prior to filing  
4 her bankruptcy schedules "because she alleges that she complained  
5 about discrimination and harassment prior to and throughout 2009."  
6 Dkt. #11, p. 8.

7 Stensland argues she was not aware of any cause of action  
8 against the defendants prior to her bankruptcy discharge. She  
9 asserts "[h]er claim did not become actionable until she was  
10 subjected to the adverse employment action of being fired." Dkt.  
11 #15, p. 4. She notes she was not fired until three months after  
12 her bankruptcy discharge, and she did not give notice to the City  
13 of her tort claim until September 9, 2010. *Id.*, p. 5.

14 It has been observed that, "[i]n the context of failure to  
15 disclose a claim in bankruptcy, the law of judicial estoppel is  
16 well-established in this circuit." *Simoneau v. Nike, Inc.*, No. 04-  
17 CV-1733-BR, 2006 WL 977302, at \*3 (D. Or. Apr. 6, 2006) (Brown,  
18 J.). The Ninth Circuit Court of Appeals discussed the judicial  
19 estoppel doctrine in *Hamilton v. State Farm Fire & Casualty Co.*,  
20 270 F.3d 778 (9th Cir. 2001), a case on which the defendants rely.  
21 The *Hamilton* court explained:

22           Judicial estoppel is an equitable doc-  
23 trine that precludes a party from gaining an  
24 advantage by asserting one position, and then  
25 later seeking an advantage by taking a clearly  
26 inconsistent position. *Rissetto v. Plumbers &*  
27 *Steamfitters Local 343*, 94 F.3d 597, 600-601  
28 (9th Cir. 1996); *Russell v. Rolfs*, 893 F.2d  
1033, 1037 (9th Cir. 1990). This court  
invokes judicial estoppel not only to prevent  
a party from gaining an advantage by taking  
inconsistent positions, but also because of  
"general consideration[s] of the orderly  
administration of justice and to 'protect

1           against a litigant playing fast and loose with  
2           the courts.' *Russell*, 893 F.3d at 1037.

3 *Hamilton*, 270 F.3d at 782.

4           The *Hamilton* court observed that the United States Supreme  
5 Court has "listed three factors that courts *may* consider in  
6 determining whether to apply the doctrine of judicial estoppel[.]"  
7 *Id.* (emphasis in original). The three factors were enumerated by  
8 the Court in *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121  
9 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001). The *Hamilton* court  
10 summarized the three factors as follows: (1) whether the party's  
11 later position is "'clearly inconsistent' with its earlier  
12 position"; *Hamilton*, 270 F.3d at 782 (citations omitted); (2)  
13 whether a court accepted the party's earlier position, "so that  
14 judicial acceptance of an inconsistent position in a later  
15 proceeding would create 'the perception that either the first or  
16 the second court was misled'"; *id.* (quoting *Edwards v. Aetna Life*  
17 *Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)); and (3) "whether the  
18 party seeking to assert an inconsistent position would derive an  
19 unfair advantage or impose an unfair detriment on the opposing  
20 party if not estopped"; *Hamilton*, 270 F.3d at 783 (citations  
21 omitted). The *New Hampshire* Court noted these three factors are  
22 not exclusive or inflexible, nor is the formula exhaustive.  
23 Rather, the equities must be balanced in each specific factual  
24 context. *Id.* (paraphrasing *New Hampshire*, 532 U.S. at 751, 121  
25 S. Ct. at 1815).

26           The *Hamilton* court explained that judicial estoppel acts to  
27 prevent litigants from taking inconsistent positions within a  
28 single action, and also "from making incompatible statements in two

1 different cases." *Id.* (citing *Rissetto v. Plumbers & Steamfitters*  
2 *Local 343*, 94 F.3d 597, 605 (9th Cir. 1996)). "In the bankruptcy  
3 context, a party is judicially estopped from asserting a cause of  
4 action not raised in a reorganization plan or otherwise mentioned  
5 in the debtor's schedules or disclosure statements." *Id.* (citing  
6 *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557  
7 (9th Cir. 1992); additional citations from other Circuits omitted).  
8 Notably, however, because "[j]udicial estoppel seeks to prevent the  
9 deliberate manipulation of the courts[,] it is inappropriate . . .  
10 when a party's prior position was based on inadvertence or  
11 mistake." *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997)  
12 (citations omitted; emphasis added).

13 Application of the three *New Hampshire* factors to the facts of  
14 this case supports the defendants' position. First, Stensland's  
15 "later position" -- that is, her claims asserted against the  
16 defendants in this action -- clearly is inconsistent with her prior  
17 position in her bankruptcy case, where she represented that she had  
18 no claims, contingent or otherwise, against the defendants, or  
19 against anyone else for that matter. Even contingent, disputed,  
20 and unmatured claims fall within the scope of the claims that must  
21 be disclosed in bankruptcy. *Simoneau*, 2006 WL 977302, at \*3  
22 (citing 11 U.S.C. § 101(5), which defines the term "claim" to mean,  
23 *inter alia*, a "right to payment, whether or not such right is  
24 reduced to judgment, liquidated, unliquidated, fixed, contingent,  
25 matured, unmatured, disputed, undisputed, legal, equitable,  
26 secured, or unsecured"); see *Hay*, 978 F.2d at 557 (despite the fact  
27 that not *all* facts were known to the debtor, "enough was known to  
28

1 require notification of the existence of the asset to the  
2 bankruptcy court") (citations omitted).

3 Second, Stensland succeeded in persuading the bankruptcy court  
4 to accept her earlier position, which resulted in a no-asset  
5 discharge. Judicial acceptance of her inconsistent position in  
6 this proceeding would create the misconception that either the  
7 bankruptcy court or this court was misled. See *Hamilton*, 270 F.3d  
8 at 782 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599  
9 (6th Cir. 1982)).

10 Third, Stensland would derive an unfair advantage over her  
11 creditors if she were allowed to maintain her inconsistent  
12 position, undermining the integrity of the very judicial system the  
13 doctrine of judicial estoppel seeks to protect. See *Oneida Motor*  
14 *Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir.  
15 1988). I note Stensland and her husband had over \$2 million in  
16 debt, \$1.5 million of which was unsecured. Creditors rely on the  
17 assets listed in a debtor's bankruptcy schedules in determining  
18 whether or not to contest discharge. See *Whitworth v. Nat'l Enter.*  
19 *Sys., Inc.*, No. 08-968-PK, 2009 WL 2948529, at \*4 (D. Or. Sept. 9,  
20 2009) (King, J.) (citing *Hamilton*, 270 F.3d at 785). "The  
21 possibility that the debtor has a meritorious employment  
22 discrimination claim might cause a creditor to think twice before  
23 conceding to the discharge of debts." *Harvey v. Southern Minn.*  
24 *Beet Sugar Coop.*, No. 02-4934, 2004 WL 368471, at \*2 (D. Minn. Feb.  
25 26, 2004) (citing *United States ex rel. Gebert v. Transp. Admin.*  
26 *Servs.*, 260 F.3d 909, 913 (8th Cir. 2001) ("property of the  
27 bankruptcy estate includes all causes of action that the debtor  
28

1 *could have brought at the time of the bankruptcy petition*";  
2 emphasis by the *Harvey* court).

3 This analysis assumes Stensland's claims against the  
4 defendants accrued prior to her discharge in bankruptcy. Stensland  
5 argues otherwise, and further asserts, without citation to any  
6 supporting authority, that the question of her "knowledge of a  
7 potential claim is [a] factual determination that must be decided  
8 by the finder of fact." Dkt. #15, p. 5. The issue of when a cause  
9 of action "accrues" for purposes of a § 1983 action is governed by  
10 federal law. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 379  
11 (9th Cir. 1998). "Under federal law, the claim generally accrues  
12 when the plaintiff 'knows or has reason to know of the injury which  
13 is the basis of the action.'" *Id.* (quoting *Elliott v. City of*  
14 *Union City*, 25 F.3d 800, 801-02 (9th Cir. 1994)). "Courts impose  
15 judicial estoppel when the debtor 'has knowledge of enough facts to  
16 know that a potential cause of action exists during the pendency of  
17 the bankruptcy, but fails to amend [her] schedules or disclosure  
18 statements to identify the cause of action as a contingent asset.'" *Franklin v. Nike, Inc.*, No. CV-07-1667-PK, 2009 WL 6048126, at \*6  
19 (D. Or. Nov. 13, 2009) (Papak, M.J.); *cf. Stupek v. Wyle Labs.*  
20 *Corp.*, 327 Or. 433, 438, 963 P.2d 678, 681 (1998) (cause of action  
21 under Oregon law accrues when facts have occurred and are in  
22 existence that would be necessary for the plaintiff to prove in  
23 order to support a right to judgment).

24  
25 To determine whether Stensland knew or had reason to know,  
26 prior to her bankruptcy discharge, that she had a potential claim  
27 for gender-based discrimination or sexual harassment, the court  
28 must examine the elements of those claims and determine when the

1 events occurred that would have given rise to a potential claim.  
2 Stensland couches her § 1983 claims in terms of Fourteenth  
3 Amendment violations, rather than strictly as violations of Title  
4 VII. *Cf. Stewart v. Jackson County*, slip op., No. CV-09-3039-CL,  
5 2010 WL 4955874, at \*3 (D. Or. Nov. 29, 2010) (Clarke, M.J.)  
6 (observing that "a plaintiff must exhaust administrative remedies  
7 by filing a claim with the EEOC or BOLI before bringing a title VII  
8 action[, but] [s]ections 1981 and 1983 do not require such  
9 exhaustion") (citing 42 U.S.C. § 2000e-5(f); *Surrell v. California*  
10 *Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008)).

11 In her First Claim for Relief, Stensland claims the defendants  
12 violated her right to equal protection of laws prohibiting  
13 discrimination and harassment on the basis of a person's sex, and  
14 prohibiting a hostile work environment. "Title VII of the Civil  
15 Rights Act of 1964 makes it 'an unlawful employment practice for an  
16 employer . . . to discriminate against any individual with respect  
17 to his compensation, terms, conditions, or privileges of  
18 employment, because of such individual's race, color, religion,  
19 sex, or national origin.'" *Harris v. Forklift Systems, Inc.*, 510  
20 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (quoting  
21 42 U.S.C. § 2000e-2(a)(1)). Thus, although pled under section  
22 1983, the genesis of Stensland's claim is in Title VII.

23 The Ninth Circuit has explained the elements of a Title VII  
24 sexual harassment and hostile work environment claim as follows:

25 "To state a claim under Title VII, sexual  
26 harassment 'must be sufficiently severe or  
27 pervasive to alter the conditions of the  
28 victim's employment and create an abusive  
working environment.'" *Ellison v. Brady*, 924  
F.2d 872, 876 (9th Cir. 1991) (citation  
omitted). To prevail under a hostile environ-

ment claim, a plaintiff must show that the environment was both objectively and subjectively hostile, that is, that (1) a reasonable person would find the environment hostile or abusive and (2) the victim subjectively perceived her environment to be abusive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, [370-71,] 126 L. Ed. 2d 295 (1993). . . .

*Best v. California Dept. of Corrections*, 21 Fed. Appx. 553, 556 (9th Cir. 2001) (citation omitted).

The *Best* court also discussed how the determination is made as to whether a work environment is sufficiently hostile or abusive for purposes of a Title VII claim:

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23[, 114 S. Ct. at 371]. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) do not amount to discriminatory changes in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, [2283,] 141 L. Ed. 2d 662 (1998); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994). *Faragher* emphasized that "conduct must be extreme to amount to a change in the terms and conditions of employment." 524 U.S. at 788. Furthermore, it is clear that though harassing conduct or language need not be sexual in nature in order to state a hostile work environment claim under title VII, the harassment must be based on the victim's gender. See *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 737 (8th Cir. 2000); cf. *Ellison*, 924 F.2d at 875 n.4.

*Id.*; see *Patrick v. Martin*, 402 Fed. Appx. 284, 285 (9th Cir. 2010) (verbal harassment, standing alone, is insufficient to state a claim under § 1983) (citing *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987)).

1        Stensland knew or had reason to know that she was being  
2 harassed and subjected to discriminatory treatment on the basis of  
3 her gender at the time each incident allegedly occurred. She has  
4 alleged that the ongoing, pervasive harassment affected her work  
5 environment and the performance of her job, and her complaints  
6 about the ongoing harassment led to a reduction in her work  
7 assignments and ultimately to her termination. She therefore knew  
8 "of the injury which is the basis of the action." *Cabrera, supra*.  
9 She had knowledge of enough facts to know that a potential cause of  
10 action existed for sexual harassment and gender-based discrimi-  
11 nation long before her employment was terminated, and certainly  
12 while her bankruptcy case was pending. Her claims for gender-based  
13 discrimination, sexual harassment, and hostile work environment  
14 accrued at the time she allegedly was harassed and subjected to  
15 discriminatory treatment. Those claims existed whether or not her  
16 employment ultimately was terminated.

17        The court recognizes that there could be a case (and perhaps  
18 this is one) in which discriminatory or harassing conduct occurs  
19 over a period of time. For awhile, the conduct may not amount to  
20 a severe or pervasive enough environment to be actionable, but  
21 enough egregious conduct may, at some point, accrue for it to be  
22 actionable. For Stensland, the question becomes, "When did the  
23 alleged conduct go over the tipping point?" A question of fact may  
24 exist as to whether the tipping point was reached only after her  
25 employment was terminated, and before that time, while the conduct  
26 was offensive, it was not actionable. If the facts are not clear  
27 as to when it became actionable, then the question becomes, "When  
28 did it become 'potentially actionable' enough to require Stensland

1 to list it on her bankruptcy schedules?" Despite the intellectual  
2 attraction of this hair-splitting, the court finds the purpose of  
3 the Bankruptcy Act is best served by requiring a debtor to err on  
4 the side of claim disclosure, which Stensland did not do in this  
5 case.

6 The court finds Stensland is judicially estopped from  
7 asserting any claims made in reliance on adverse employment actions  
8 and discriminatory behavior that preceded her bankruptcy discharge.  
9 Her position in the bankruptcy proceeding that she did not have any  
10 potential claims was inconsistent with her current position that  
11 Fisher, Stone, and Bowers subjected her to discriminatory treatment  
12 and created a hostile work environment prior to February 16, 2010.  
13 She may, however, continue to pursue claims that relate to  
14 discriminatory treatment and adverse employment actions occurring  
15 after February 16, 2010. For example, she could not have known,  
16 during the pendency of her bankruptcy case and prior to her  
17 bankruptcy discharge, that she would be terminated by the City on  
18 May 21, 2010. *Cf. Franklin*, 2009 WL 6048126, at \*7. In addition,  
19 as Stensland maintains in her brief, events that occurred prior to  
20 February 16, 2010, can be considered as evidence relating to her  
21 retaliatory discharge claim.

22 However, the court finds that entry of summary judgment on  
23 Stensland's pre-February 16, 2010, claims would be premature at  
24 this juncture. In order to ensure the integrity of the bankruptcy  
25 system and the judicial system as a whole, and to ensure the just  
26 resolution of the parties' claims on their merits, Stensland is  
27 granted thirty days, to **January 16, 2012**, to substitute the  
28 bankruptcy trustee as the real party in interest with regard to her

1 pre-February 16, 2010, claims, or alternatively, to have the  
2 bankruptcy trustee ratify those claims by formally abandoning the  
3 pre-February 16, 2010, claims as assets of the bankruptcy estate.  
4 See *Schneider v. Unum Life Ins. Co.*, No. CV05-1402-PK, 2008 WL  
5 1995459, at \*4 (D. Or. May 6, 2008) (Redden, J.) (ordering  
6 plaintiff to take similar actions). Should Stensland fail to take  
7 either of these actions by **January 16, 2012**, then the court will  
8 enter summary judgment against her on those pre-February 16, 2010,  
9 claims.

10 The court, therefore, **reserves** ruling on the defendants'  
11 motion for summary judgment as to Stensland's pre-February 16,  
12 2010, claims until after **January 16, 2012**.

13  
14 **B. Breach of Employment Contract**

15 The defendants argue Stensland was at all times an at-will  
16 employee, precluding her Seventh, Eighth, Ninth, and Tenth Claims  
17 for Relief, all of which seek damages for the City's alleged breach  
18 of an employment contract between Stensland and the city. The  
19 defendants seek summary judgment on those claims.

20 "[E]mployment contracts in Oregon are presumed to be at-will."  
21 *Arboireau v. Adidas-Salomon AG*, 347 F.3d 1158, 1162 (9th Cir. 2003)  
22 (citing *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or. App. 371, 879  
23 P.2d 1288, 1293 (1994)). "'Under Oregon law, there is a legal  
24 presumption that absent a contractual, statutory or constitutional  
25 requirement, an employer may discharge an employee at any time and  
26 for any reason.'" *Bland v. Blount, Inc.*, No. CV 00-579-BR, 2001 WL  
27 814954, at \*2 (D. Or. Apr. 9, 2001) (Brown, J.) (quoting *Koepping*  
28 *v. Tri-County Metro. Transp. Dist.*, 120 F.3d 998, 1002 (9th Cir.

1 1997)); accord *Rushing v. SAIF Corp.*, 223 Or. App. 665, 669, 196  
2 P.3d 115, 117 (2008) (at-will employee can be terminated "for any  
3 reason, or for no reason at all, and at any time") (citing *State v.*  
4 *Saxon, Marquoit, Bertonit & Todd*, 166 Or. App. 1, 6, 999 P.2d 1152,  
5 1154 (2000)); *Patton v. J.C. Penney Co.*, 719 P.2d 854, 856 (Or.  
6 1986), abrogated on other grounds by *McGanty v. Staudenraus*, 901  
7 P.2d 841 (1995). Even the employer's motives are irrelevant;  
8 indeed, an at-will employment relationship may be terminated "even  
9 for a bad cause." *Lund v. Arbonne Intern., Inc.*, 132 Or. App. 87,  
10 92, 887 P.2d 817, 821 (1994) (citations omitted).

11 Stensland argues, however, that the City's employment  
12 policies, as expressed in both verbal statements and written  
13 documents, are contractually enforceable, even in an at-will  
14 employment context. Stensland argues the court first must  
15 determine whether the terms contained in the City's employee manual  
16 are ambiguous. Dkt. #15, p. 7. However, she has failed to point  
17 to any language in the Staff Directives, or any other document  
18 distributed by the City, that states any policy the court must  
19 interpret. The only evidence presented here is, on the one hand,  
20 Directive #41, expressly stating Management employees are employed  
21 by the City at-will, which Stensland acknowledges having received;  
22 and, on the other hand, alleged "assurances" by Stone and Bowers  
23 that a management-level employee would not be terminated for  
24 performance-related issues without first receiving counseling, and  
25 an opportunity to improve in the areas of concern.

26 In Stensland's Complaint, she alleges the City's "written  
27 employment policies" set forth the "promise" that she would not be  
28 discharged "for substandard performance without first calling the

1 substandard performance to [her] attention"; and if her performance  
2 ever was found to be substandard, "she would be subjected to  
3 progressive discipline, including verbal warnings for the first  
4 instance of poor performance and written warnings for the second  
5 instance of the same substandard performance prior to termination."  
6 Dkt. #1, ¶ 84(a) & (b). The only "written employment policies"  
7 Stensland has submitted to the court are the Staff Directives, none  
8 of which discusses, or even mentions, progressive disciplinary  
9 policies the City will follow prior to terminating an employee.  
10 Stensland has alluded to provisions in a collective bargaining  
11 agreement governing the City's union employees, but she has offered  
12 no evidence to prove she was covered by any such document, nor has  
13 she offered the document itself for the court's review.

14 The court finds Stensland has failed to meet her burden to  
15 come forward with *some* evidence from which a jury could find a  
16 written employment contract existed that rendered Stensland  
17 anything other than an at-will employee. Therefore, the  
18 defendants' motion for summary judgment as to Stensland's Seventh  
19 Claim for Relief: Breach of Employment Contract (Against City of  
20 Wilsonville) is **granted**.

21 Stensland also alleges that an implied contract was created by  
22 virtue of the City's maintenance of "employment policies and a  
23 course of conduct regarding progressive discipline including but  
24 not limited to evaluations of performance, verbal warnings, written  
25 warnings, transfers, temporary suspension and termination." Dkt.  
26 #1, ¶ 92. She argues that "[u]pon review of the employee handbook,  
27 it is clear that the terms are ambiguous [and] thus factual issues  
28 remain as to whether the parties intended the relationship to be at

1 will or only for cause." Dkt. #15, p. 8. Again, Stensland has  
2 failed to point to any evidence that these employment policies  
3 existed or were put into practice, other than her allegations  
4 regarding Stone's and Bowers's verbal "assurances." She has  
5 pointed to no "terms" in any "employee handbook" to support her  
6 claim. Her allegations in the Complaint, and conclusory assertions  
7 in her Declaration, regarding verbal assurances she was given are  
8 insufficient to sustain Stensland's burden on summary judgment.  
9 See *Giulio v. BV CenterCal, LLC*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL  
10 3924166, at \*10 (D. Or. Sept. 6, 2011) (Hernandez, J.) ("A  
11 nonmoving party cannot defeat summary judgment by relying on the  
12 allegations in the complaint, or with unsupported conjecture or  
13 conclusory statements.") (citing *Hernandez v. Spacelabs Medical,*  
14 *Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003); Fed. R. Civ. P. 56).  
15 Stensland has failed to come forward with admissible evidence to  
16 support her claim that an implied contract existed between the  
17 parties. "The 'mere existence of a scintilla of evidence in  
18 support of [her] position [is] insufficient.'" *Giulio*, 2011 WL  
19 3924166, at \*10 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
20 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986); Fed. R.  
21 Civ. P. 56(c) (2010)). Even drawing all reasonable inferences in  
22 Stensland's favor, the court finds no jury reasonably could render  
23 a verdict in her favor on her claim that an implied contract  
24 existed, and was breached. Therefore, the defendants' motion for  
25 summary judgment as to Stensland's Eighth Claim for Relief: Breach  
26 of Implied Contract (Against City of Wilsonville) is **granted**.

27 Stensland further alleges that Stone's and Bowers's "verbal  
28 assurances" constituted "an enforceable oral contract" which was

1 breached when Stensland was terminated without receiving counseling  
2 and an opportunity to improve any performance concerns. *Id.*, ¶¶ 97  
3 & 98. "Oregon case law is clear that oral promises may support a  
4 claim for breach of contract." *Koepping v. Tri-County Metro.*  
5 *Transp. Dist.*, 120 F.3d 998, 1003 (9th Cir. 1997); *cf. Hutton v.*  
6 *Jackson County*, slip op., 2010 WL 4906205, at \*13 (D. Or. Nov. 23,  
7 2010) (Clarke, M.J.). However, "[a] casual remark made at a  
8 meeting, a phrase plucked out of context, is too fragile a base on  
9 which to rest such a heavy obligation inherent in [a contract of  
10 employment.]" *Koepping*, 120 F.3d at 1003 (quoting *Mursch v. Van*  
11 *Dorn Co.*, 851 F.2d 990, 997 (7th Cir. 1988)).

12 The determination as to whether or not an enforceable contract  
13 exists is a question of law, "using a standard of objective intent,  
14 measured by whether a reasonable person would construe a promise  
15 from the words and acts of the other." *Hutton*, 2010 WL 4906205, at  
16 \*12 (citations omitted); *see Pereira v. Thompson*, 230 Or. App. 640,  
17 217 P.3d 236 (2009) ("Whether a contract exists is a question of  
18 law."). When oral promises are directly contradicted by language  
19 in generally-distributed, written materials stating that employment  
20 is at-will and can be terminated by either party, an employee's  
21 reliance on oral promises is considered unreasonable. *Koepping*,  
22 120 F.3d at 1003.<sup>1</sup> This is just such a case. Any oral statements  
23 by Stone and Bowers regarding the City's termination policies were  
24  
25

---

26 <sup>1</sup>In any event, Stensland has not alleged or shown that she  
27 acted in reliance on Stone's and Bowers's verbal statements. She  
28 also has failed to allege or show that either Stone or Bowers had  
the authority to enter into contractual modifications relating to  
Stensland's employment status on the City's behalf.

1 directly contradicted by language in Directive #41, expressly  
2 specifying that all management employees were employed at will.

3 The court finds as a matter of law that even if Stone and  
4 Bowers made the statements alleged by Stensland, those statements  
5 nevertheless did not change Stensland's at-will employment and did  
6 not create an oral employment contract. The defendants' motion for  
7 summary judgment on Stensland's Ninth Claim for Relief: Breach of  
8 Oral Contract (Against City of Wilsonville), is, therefore,  
9 **granted.**

10 Stensland's Tenth Claim for Relief, alleging the City breached  
11 its duty of good faith and fair dealing, arises from the alleged  
12 existence of an employment contract. In addressing Stensland's  
13 Seventh, Eighth, and Ninth Claims for Relief, above, the court has  
14 found that no employment contract existed, and Stensland was at all  
15 relevant times an at-will employee of the City. Accordingly, no  
16 claim can be maintained for breach of any duty related to a  
17 nonexistent employment contract, and the defendants' motion for  
18 summary judgment on this claim also is **granted.**

19  
20 **C. Wrongful Discharge**

21 The defendants seek dismissal of Stensland's wrongful  
22 discharge claim, arguing the claim is not permitted under Oregon  
23 law. The court has discussed, above, the law relating to at-will  
24 employment in Oregon. See *S B, supra*. In *Winn v. Case Corp.*, 33  
25 F.3d 61 (Table), 1994 WL 444616 (9th Cir. 1994), the Ninth Circuit  
26 observed that Oregon recognizes two exceptions to the general at-  
27 will-employment rule; i.e., "discharge for exercising a job-related  
28 right and discharge for complying with a public duty." *Id.*, 1994

1 WL 44616, at \*2 (citing *Patton*, 719 P.2d at 856-57); see *Babick v.*  
2 *Oregon Arena Corp.*, 333 Or. 401, 407 (2002) (same). This court has  
3 observed that resisting sexual harassment is an example of the  
4 exercise of a job-related right. *Draper v. Astoria Sch. Dist.*, 995  
5 F. Supp. 1122, 1127 (D. Or. 1998), *abrogated in part on other*  
6 *grounds by Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967  
7 (9th Cir. 2003) (citation omitted).

8 Stensland clearly had a right to be free from gender-based  
9 discrimination and sexual harassment in the workplace, whether from  
10 above or below her in the chain of command; to report to her  
11 superiors when actions constituting harassment or discrimination  
12 occurred; and to expect that her complaints would be addressed  
13 properly. These rights arise under federal and state law, as well  
14 as under the City's own anti-harassment and anti-discrimination  
15 directives. If, as Stensland alleges, her termination resulted  
16 from her complaints about a hostile work environment due to sexual  
17 harassment and gender-based discrimination, then her termination  
18 would be contrary to public policy, and her wrongful discharge  
19 claim would constitute the type of "narrow exception to the at-will  
20 employment doctrine" contemplated by the Oregon courts in  
21 establishing the tort of wrongful discharge. See *Draper*, 995  
22 F. Supp. at 1127 ("In Oregon, the tort of wrongful discharge was  
23 established to serve as a narrow exception to the at-will  
24 employment doctrine in certain limited circumstances where the  
25 courts have determined that the reasons for the discharge are so  
26 contrary to public policy that a remedy is necessary in order to  
27 deter such conduct.") (citations omitted).

1        However, the tort of wrongful discharge was intended to  
2 provide a remedy for unacceptable conduct only when no other  
3 adequate remedy is available. See *Cantley v. DSMF, Inc.*, 422  
4 F. Supp. 2d 1214, 1220 (D. Or. 2006) (King, J.) (tort of wrongful  
5 discharge "never was intended to be a tort of general application  
6 but rather [is] an interstitial tort to provide a remedy when the  
7 conduct in question was unacceptable and no other remedy was  
8 available'") (quoting *Draper*, 995 F. Supp. at 1128; additional  
9 citation omitted). If an existing remedy is adequate to protect  
10 the interests of society, then the tort remedy of wrongful  
11 discharge is precluded. See *Draper*, 995 F. Supp. at 1130-31; *Ryan*  
12 *v. HSC Real Estate*, slip op., No. CV08-1465-KI, 2010 WL 3222443, at  
13 \*3 (D. Or. Aug. 11, 2010) (King, J.). A claim under 42 U.S.C.  
14 § 1983 may provide such an adequate federal remedy, precluding a  
15 state-law claim for wrongful discharge when the state-law claim and  
16 the § 1983 claim are "based upon the same allegations." See  
17 *Draper*, 995 F. Supp. at 1131. Oregon law prohibiting unlawful  
18 employment discrimination also may provide an adequate remedy to  
19 protect the interests of society in maintaining non-discriminatory  
20 workplaces. See ORS § 659A.030 (prohibiting employment  
21 discrimination on the basis of race, color, religion, sex, sexual  
22 orientation, national origin, marital status, or age).

23        In the present case, Stensland alleges she was wrongfully  
24 discharged in retaliation for her attempts to enforce her rights  
25 under ORS § 659A.030 and 42 U.S.C. § 1983. Both of these statutes  
26 allow a successful plaintiff to recover, where applicable,  
27 equitable relief, compensatory damages, and punitive damages. See  
28 ORS § 659A.881(1) & (3)(a); 42 U.S.C. § 1983. Moreover, § 1983

1 constitutes the exclusive federal remedy for Stensland's equal  
2 protection claims. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S.  
3 701, 733, 109 S. Ct. 2702, 2722, 105 L. Ed. 2d 598 (1989) ("the  
4 express cause of action for damages created by § 1983 constitutes  
5 the exclusive federal remedy for violation of the rights guaranteed  
6 in § 1981 by state governmental units"); *Pittman v. Oregon,*  
7 *Employment Dept.*, 509 F.3d 1065, 1068 (9th Cir. 2007) (citing  
8 *Jett*).

9 As the *Draper* court noted, a § 1983 claim will not always  
10 provide an adequate remedy to preclude a wrongful discharge claim.  
11 For example, a § 1983 claim "is subject to unique defenses, such as  
12 qualified immunity." *Draper*, 995 F. Supp. at 1131. However, on  
13 the facts of this case, the court finds the state and federal  
14 statutes do provide an adequate remedy, precluding Stensland's  
15 common-law wrongful discharge claim. Her statutory and common-law  
16 claims are "based upon the same allegations." She will have to  
17 prove substantially similar elements to prevail on either the  
18 statutory claim or the common-law wrongful discharge claim. She  
19 will have to show that she engaged in a protected activity, and she  
20 was terminated in retaliation for engaging in the protected  
21 activity. Remedies available under the statutes and the common-law  
22 claim also are the same. "For actions alleging violations of ORS  
23 § 659A.030, the court may award equitable relief, compensatory  
24 damages, and punitive damages. ORS § 659A.885(1) & 3(a). These  
25 are the same remedies available for the tort of wrongful  
26 discharge." *Ryan*, 2010 WL 3222443, at \*3. The standard of proof  
27 (preponderance of the evidence) also is the same under both the  
28 statutory and the common-law claim.

1 Thus, because ORS § 659A.030 and 42 U.S.C. § 1983 provide an  
 2 adequate remedy at law for Stensland's wrongful discharge claim,  
 3 she cannot maintain a common-law claim for wrongful discharge under  
 4 Oregon law. Therefore, the defendants' motion to dismiss  
 5 Stensland's Sixth Claim for Relief (Wrongful Discharge, against the  
 6 City) is **granted**.

7  
 8 **D. Section 1983 Claims**

9 The defendant City of Wilsonville moves for summary judgment  
 10 on Stensland's First and Second Claims for Relief against the City,  
 11 in which she asserts violations of 42 U.S.C. § 1983. Section 1983  
 12 provides, in pertinent part:

13 Every person who, under color of any statute,  
 14 ordinance, regulation, custom, or usage, of  
 15 any State or Territory or the District of  
 16 Columbia, subjects, or causes to be subjected,  
 17 any citizen of the United States or other  
 18 person within the jurisdiction thereof to the  
 deprivation of any rights, privileges, or  
 immunities secured by the Constitution and  
 laws, shall be liable to the party injured in  
 an action at law, suit in equity, or other  
 proper proceeding for redress. . . .

19 42 U.S.C. § 1983 (1996).

20 "[M]unicipalities and other local governmental bodies are  
 21 'persons' within the meaning of § 1983 . . . [but] a municipality  
 22 may not be held liable under § 1983 solely because it employs a  
 23 tortfeasor." *Board of County Comm'rs of Bryan County, Okla. v.*  
 24 *Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1387-88, 137 L. Ed. 2d  
 25 626 (1997). Stensland may establish the City's liability under  
 26 § 1983 in one of the following three ways:

27 First, [she] may prove that a city employee  
 28 committed the alleged constitutional violation  
 pursuant to a formal governmental policy or a

1           longstanding practice or custom which consti-  
2           tutes the standard operating procedure of the  
3           [City]. . . . Second, [she] may establish  
4           that the individual who committed the  
5           constitutional tort was an official with final  
6           policy-making authority and that the  
7           challenged action itself thus constituted an  
8           act of official governmental policy. . . .  
9           Whether a particular official has final  
10          policy-making authority is a question of state  
11          law. . . . Third, [she] may prove that an  
12          official with final policy-making authority  
13          ratified a subordinate's unconstitutional  
14          decision or action and the basis for it.

15          *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992)  
16          (internal quotation marks, citations omitted).

17          Stensland argues she has alleged facts sufficient for a jury  
18          to render a verdict in her favor under all three of the *Gillette*  
19          criteria. See Dkt. #15, pp. 9-12. She alleges the City endorsed  
20          and approved the actions of Fisher, Stone, and Bowers, and ratified  
21          their unconstitutional actions by failing to investigate her claims  
22          of harassment, discrimination, and hostile work environment. She  
23          claims this constituted a policy, custom, or longstanding practice  
24          because her complaints regarding the unconstitutional activities  
25          were ongoing over a long period of time, with ongoing acceptance  
26          and ratification by officials with final policy-making authority,  
27          including the City Manager, Arlene Loble.

28          The defendants have the initial burden to prove the absence of  
29          a genuine issue of material fact. *In re Oracle Corp.*, 627 F.3d at  
30          387 (citation omitted). Although the defendants need not "support  
31          [their] motion with affidavits or other similar materials *negating*  
32          the opponent's claim," the court should not grant summary judgment  
33          unless the record before the court "demonstrates that the standard  
34          for the entry of summary judgment . . . is satisfied." *Celotex*

1 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91  
2 L. Ed. 2d 265 (1986). Here, the defendants have failed to prove  
3 the absence of a genuine issue of material fact regarding  
4 Stensland's § 1983 claim against the City. Although they state, in  
5 their brief, that City policy-making rests with the City Manager,  
6 with approval of the City Council, see Dkt. #11, p. 10, they have  
7 offered no evidence to support that statement, nor have they shown  
8 that the final policy-making authority was not delegated.  
9 Stensland alleges she was told by Bowers that the City Manager had  
10 delegated to him the decision-making responsibility regarding  
11 Stensland's termination. See Dkt. #20, ¶ 19. "The substantive law  
12 governing a claim or defense determines whether a fact is  
13 material. . . . If the resolution of a factual dispute would not  
14 affect the outcome of the claim, the court may grant summary  
15 judgment." *Day v. United Parcel Serv., Inc.*, slip op., No. 09-CV-  
16 1261-SU, 2011 WL 5239732, at \*2 (D. Or. Nov. 1, 2011) (Brown, J.)  
17 (citing *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th  
18 Cir. 2006)). Here, resolution of the factual issue regarding who  
19 actually had policy-making authority for the City with regard to  
20 investigations of harassment and discrimination, and in this  
21 particular instance, with regard to Stensland's termination and the  
22 basis for it, could affect the outcome of Stensland's § 1983 claim  
23 against the city.

24 This analysis is illustrated by the U.S. Supreme Court's  
25 decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-41,  
26 106 S. Ct. 1292, 1298-99, 89 L. Ed. 2d 452 (1986), summarized by  
27 the court in *Williams v. Multnomah Education Service District*, No.  
28

1 CV-97-1197-ST, 1999 WL 454633 (D. Or. Apr. 14, 1999) (Stewart,  
2 M.J.; opinion adopted *in toto* by Frye, J.), as follows:

3           In *Pembaur*, . . . the Supreme Court held  
4           that a single decision by a municipal policy-  
5           maker may be sufficient to trigger municipi-  
6           tality liability under § 1983 as long as there  
7           was a " deliberate choice to follow a course  
8           of action [] made from among various alterna-  
9           tives by the official or officials responsible  
10          for establishing final policy with respect to  
11          the subject matter in question." However, the  
12          municipal policymaker must have final authori-  
13          ty to establish municipal policy. Authority  
14          to make municipal policy may be granted by  
15          state legislative enactment or may be dele-  
16          gated by an official with final policymaking  
17          authority. The Court provided an example  
18          clarifying its ruling. In the example, a  
19          Board of County Commissioners sets the county  
20          employment policy but allows the County  
21          Sheriff discretion to hire and fire employees.  
22          If the Sheriff exercises his discretion in an  
23          unconstitutional manner, the county would not  
24          be liable because the Board still controls  
25          county policy. But if the Board had delegated  
26          its power to establish final employment policy  
27          to the Sheriff, then the Sheriff's decisions  
28          would represent county policy and the county  
29          would be liable.

30 *Williams*, 1999 WL 4546333, at \*11. In the present case, the record  
31 is insufficient to prove who had final authority to establish the  
32 City's policy regarding the investigation of claims of harassment  
33 and discrimination, the termination of employees within particular  
34 departments, or whether the authority to terminate Stensland was  
35 delegated to Bowers in this particular case.

36           Stensland also argues significant discovery remains to be  
37 completed in this case, including depositions and outstanding  
38 responses to discovery, and she asserts this additional discovery  
39 concerns significant factual issues that likely will support her  
40 claims. She represented in her brief that "it appears a Motion to  
41 Compel will be required to address Defendants' objections to [her]

1 Requests for Production.” Dkt. #15, pp. 2-3. Nevertheless, she  
2 waited almost three months after filing her brief, and two weeks  
3 after oral argument, to file a motion to compel. She never has  
4 filed a motion under Federal Rule of Civil Procedure 56(d) to  
5 request additional time to complete discovery necessary for her to  
6 respond to the defendants’ motion for summary judgment.

7 Nevertheless, the court finds the current record is insuffi-  
8 cient to support summary judgment. On the current record, and  
9 drawing all justifiable inferences in Stensland’s favor, she has  
10 offered evidence from which a jury could render a verdict in her  
11 favor on her § 1983 claim against the City. Accordingly, the  
12 City’s motion for summary judgment on Stensland’s First and Second  
13 Claims for relief is **denied**.<sup>2</sup>

14  
15 ***E. Negligent Training and Supervision***

16 The City moves for summary judgment on Stensland’s Third Claim  
17 for Relief, in which she claims her constitutional rights were  
18 violated due to the City’s deliberate indifference and failure to  
19 “supervise, train and discipline Fisher, Stone, and Bowers  
20 regarding the City’s Anti-Harassment Policy and reporting  
21 procedures.” Dkt. #1, ¶ 52. The City also moves for dismissal of  
22 this claim, arguing the claim is not adequately pled under § 1983,  
23 and in any event, the City has no duty to train its employees with  
24 regard to the City’s sexual harassment policies. Dkt. #11, p. 17.

25 Stensland has not responded to the City’s motion for summary  
26 judgment on this issue. She has responded to the motion to

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27  
28 <sup>2</sup>But see the court’s ruling in section A, *supra*, regarding  
those claims that arose prior to February 16, 2010.

1 dismiss, arguing her Third Claim for Relief is adequately pled  
2 under § 1983, and case law supports denial of the City's motion to  
3 dismiss.

4 In *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct.  
5 1197, 103 L. Ed. 2d 412 (1989), the U.S. Supreme Court held that  
6 under certain circumstances, a municipality can be liable under  
7 § 1983 "for constitutional violations resulting from its failure to  
8 train municipal employees." *Id.*, 489 U.S. at 380, 387, 109 S. Ct.  
9 at 1200, 1204. However, the failure to train must, itself, result  
10 in the constitutional deprivation suffered by the plaintiff, and  
11 moreover, the municipality's failure to train must "reflect[]  
12 deliberate indifference to the constitutional rights of its  
13 inhabitants." *Id.*, 489 U.S. at 392, 109 S. Ct. at 1207. "Only  
14 where a municipality's failure to train its employees in a relevant  
15 respect evidences a 'deliberate indifference' to the rights of its  
16 inhabitants can such a shortcoming be properly thought of as a city  
17 'policy or custom' that is actionable under § 1983." *Id.*, 489 U.S.  
18 at 389, 109 S. Ct. at 105. This is a high standard, and requires  
19 more than, for example, "an otherwise sound program [that] has  
20 occasionally been negligently administered." *Id.*, 489 U.S. at 391,  
21 109 S. Ct. at 1206.<sup>3</sup>

22 The evidence offered by Stensland in support of this claim  
23 falls far short of that required to sustain a failure-to-train  
24 claim under *Harris*. Stensland has offered no evidence that the  
25

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26 <sup>3</sup>The passage quoted by Stensland in support of her assertion  
27 that "[t]here is a clearly adequate basis for the claim," Dkt. #15,  
28 p. 13, is not from the plurality opinion, but rather is from the  
concurring opinion by Justice O'Connor, joined by Justices Scalia  
and Kennedy. See *Harris*, 489 U.S. at 397, 109 S. Ct. at 1209.

1 City's failure to train or supervise its employees in the  
2 administration of its anti-harassment and anti-discrimination  
3 policies resulted in the harassment and discrimination of which she  
4 complains, or reflected deliberate indifference to the constitu-  
5 tional rights of the City's inhabitants. The facts as pled do not  
6 plausibly suggest a claim entitling Stensland to relief, nor do  
7 they show any genuine issue of material facts exists for trial.  
8 The court, therefore, **grants** the City's motion for summary judgment  
9 as to Stensland's Third Claim for Relief: Constitutional Rights  
10 Violations by City of Wilsonville Due to Failure to Adequately  
11 Train and Supervise. Accordingly, the defendants' motion to  
12 dismiss this claim is **found to be moot.**<sup>4</sup>

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14 <sup>4</sup>The court makes two additional observations regarding the  
15 defendants' motions on Stensland's Third Claim for Relief. First,  
16 in support of their motion to dismiss this claim, the defendants  
17 rely heavily on a quote from *Faragher v. City of Boca Raton*, 524  
18 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), for the  
19 proposition that an anti-harassment policy is not necessary "as a  
20 matter of law." See Dkt. #11, p. 17. The *Faragher* Court observed,  
21 "While proof that an employer had promulgated an antiharassment  
22 policy with complaint procedure is not necessary in every instance  
23 as a matter of law, the need for a stated policy suitable to the  
24 employment circumstances may appropriately be addressed in any case  
25 when litigating the first element of the defense." *Faragher*, 524  
26 U.S. at 807, 118 S. Ct. at 2293. The defendants have taken the  
27 quote out of context. The Court did not hold that, *as a matter of*  
28 *law*, an anti-harassment policy with complaint procedure is *never*  
necessary; rather, the Court was expanding on the proof required to  
sustain the two-part affirmative defense to liability or damages  
described by the Court in the case. The Court made the point that  
it will not always be necessary to prove "an employer had  
promulgated an antiharassment policy with complaint procedure" in  
order to prevail on the defense. See *id.*

25 Second, in support of their motion for summary judgment on  
26 this claim, the defendants argue "the claim is prohibited by the  
27 exclusive remedy provision contained in Oregon's Workers  
28 Compensation Law (ORS 656.018)[.]" Dkt. #11, p. 11; see *id.*,  
pp. 11-14. The argument presumably was based on a misunderstanding  
of the nature of this inartfully-pled claim; Stensland did not  
indicate clearly, in her Complaint, that this claim arises under

1 **F. Individual Defendants**

2 Bowers and Stone move to dismiss Stensland's First Claim for  
3 Relief against them - the only claim she has brought against these  
4 individual defendants. See Dkt. #1. Bowers and Stone argue  
5 Stensland has alleged they acted only in their official capacities  
6 during the events giving rise to this action, and therefore, the  
7 City is the only proper defendant. Stensland responds that she has  
8 properly alleged Bowers and Stone acted in their individual  
9 capacities, under color of state law. She further suggests that  
10 should the court find her complaint deficient in this regard, the  
11 deficiency may be cured by amendment.

12 Stensland has the burden to plead properly and to prove each  
13 essential element of her § 1983 claim. See *Johnson v. Knowles*, 113  
14 F.3d 1114, 1117 (9th Cir. 1997). "To state a claim for relief  
15 under section 1983, [Stensland] must plead two essential elements:  
16 1) that the Defendants acted under color of state law; and 2) that  
17 the Defendants caused [her] to be deprived of a right secured by  
18 the Constitution and laws of the United States." *Id.* (citing  
19 *Howerton v. Gabica*, 708 F.2d 380, 382 (9th Cir. 1983)). Stensland  
20 has met both prongs of this pleading requirement in her Complaint.

21 The cases demonstrate that historically, there has been  
22 considerable confusion among litigants when determining whether an  
23 action is brought against individuals in their official capacity or  
24 their individual capacity. The defendants correctly observe that  
25 when an action is brought against a person acting in an official  
26

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27 § 1983. In any event, because the court grants the defendants'  
28 motion for summary judgment as to Stensland's Third Claim for  
Relief on other grounds, the court does not address this argument.

1 capacity at the time of the alleged actions, then suit against the  
2 governmental officer in the officer's official capacity "is  
3 equivalent to a suit against the governmental entity itself."  
4 *Gomez v. Vernon*, 255 F.3d 1118, 1126 (9th Cir. 2001) (citing  
5 *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986)).

6 The U.S. Supreme Court has examined the distinction between  
7 individual-capacity (or personal-capacity) lawsuits and official-  
8 capacity lawsuits, explaining that "[p]ersonal-capacity suits seek  
9 to impose personal liability upon a governmental official for  
10 actions he takes under color of state law. . . . Official-capacity  
11 suits, in contrast, 'generally represent only another way of  
12 pleading an action against an entity of which an officer is an  
13 agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099,  
14 3105, 87 L. Ed. 2d 114 (1985) (quoting *Monell v. New York City*  
15 *Dept. of Soc. Servs.*, 436 U.S. 658, 660 n. 55, 98 S. Ct. 2018, 2035  
16 n.55, 56 L. Ed. 2d 611 (1978)). "On the merits, to establish  
17 personal liability in a § 1983 action, it is enough to show that  
18 the official, acting under color of state law, caused the  
19 deprivation of a federal right." *Id.*, 473 U.S. at 166, 105 S. Ct.  
20 at 3105 (emphasis by the Court; citing *Monroe v. Paper*, 365 U.S.  
21 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)).

22 Here, construing the Complaint in Stensland's favor and taking  
23 her factual allegations as true, see *Gambee, supra*, the court finds  
24 Stensland has pled facts sufficient to allow the court to draw the  
25 reasonable inference that the individual defendants are liable for  
26 the misconduct alleged. Stensland has pled facts indicating Stone  
27 and Bowers were aware of ongoing harassment, gender-based  
28 discrimination, and a hostile work environment created by Fisher's

1 actions, but they failed to investigate Stensland's claims  
 2 properly, and took no action to remedy the situation. She also has  
 3 alleged that her work load was reduced and she ultimately was  
 4 terminated in retaliation for her complaints. If proved at trial,  
 5 these facts could give rise to liability under § 1983.

6 The individual defendants' motion to dismiss is, therefore,  
 7 **denied.**<sup>5</sup>

### 8 9 **CONCLUSION**

10 In summary, the court orders as follows:<sup>6</sup>

11 1. Stensland has until **January 16, 2012**, to either amend her  
 12 Complaint to add the bankruptcy trustee as plaintiff with regard to  
 13 the pre-February 16, 2010, claims, or to have the bankruptcy  
 14 trustee ratify those claims by formally abandoning them as assets  
 15 of the bankruptcy estate. The court **reserves** ruling on Stensland's  
 16 claims arising prior to February 16, 2010, until after **January 16,**  
 17 **2012.**

18 2. The defendants' motion for summary judgment is **granted** as  
 19 to Stensland's Seventh, Eighth, Ninth, and Tenth Claims for Relief.

20 3. The City's motion to dismiss Stensland's Third and Sixth  
 21 Claims for Relief is **granted.**

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25 <sup>5</sup>But, again, see the court's ruling in section A, *supra*,  
 26 regarding those claims that arose prior to February 16, 2010.

27 <sup>6</sup>This order addresses Stensland's First, Second, Third, Sixth,  
 28 Seventh, Eighth, Ninth, and Tenth Claims for Relief. The  
 defendants have not moved for summary judgment or dismissal as to  
 Stensland's Fourth and Fifth Claims for Relief.

1           3.    Subject to any later ruling regarding Stensland's pre-  
2 February 16, 2010, claims, the City's motion for summary judgment  
3 as to Stensland's First and Second Claims for Relief is **denied**.

4           4.    Subject to any later ruling regarding Stensland's pre-  
5 February 16, 2010, claims, the individual defendants' motion to  
6 dismiss Stensland's First Claim for Relief against them is **denied**.

7           IT IS SO ORDERED.

8                               Dated this 14th day of December, 2011.

9                               /s/ Dennis J. Hubel

10                              \_\_\_\_\_  
11                              Dennis James Hubel  
12                              Unites States Magistrate Judge  
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